

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SANDRA SILLS

Claimant

VS.

THE BOEING COMPANY-WICHITA

Respondent

AND

AETNA CASUALTY & SURETY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 154,856

ORDER

The application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, on April 27, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through her attorney, Stephen J. Jones of Wichita, Kansas. The respondent and insurance carrier appeared by and through their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Michael T. Harris of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and disability, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The claimant was twenty-two (22) years old when she began working for Boeing in 1987. During her several years of employment, she was involved in numerous jobs requiring hand, wrist, and upper extremity, high intensive labor. She began developing problems, first, in her right shoulder in the spring of 1989. These problems worsened, until, by 1990, she was symptomatic in both upper extremities. She was provided long term treatment with several doctors and ultimately underwent several surgeries with Dr. Mark Melhorn, a local orthopedic surgeon. Subsequent to these surgeries, claimant's symptomatology worsened, affecting claimant's ability to perform her job duties at Boeing. She was returned to work on more than one occasion, with restrictions, and ultimately ended up working out of the Boeing work pool. After an extended stay in the work pool, she was laid off and has been unable to obtain employment at a comparable wage since that time.

Claimant was treated extensively by Dr. Melhorn, who rated her impairment at seven and thirty-five hundredths percent (7.35%) to the left arm and eight and one-fourth percent (8.25%) to the right arm, with restrictions against repetitive tasks, including pushing and pulling, the use of vibrator and power tools six (6) hours or less per eight (8) hour day, and further restricted claimant to light to medium work, thirty-five (35) pounds maximum lift, twenty (20) pounds frequent lift. With these restrictions, claimant would be unable to return to her employment at Boeing. The combined ratings given by Dr. Melhorn equate to a nine and two-tenths percent (9.2%) whole body rating.

Claimant was also examined by Dr. Ernest Schlachter, a medical doctor from Wichita, Kansas. Dr. Schlachter restricted claimant from repetitive pushing, pulling, twisting or grasping with either hand or arm. He also restricted repetitive lifting to ten (10) pounds or less, with either hand or arm, with no single lift being more than fifteen (15) pounds. He advised against work above the horizontal, with either arm, advised against the use of vibratory tools and working in cold environments, and further cautioned claimant to stop smoking because she was diagnosed as having Raynaud's phenomenon. Dr. Schlachter rated claimant at thirty-five percent (35%) to the body as a whole, on a functional basis.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 1990 Supp. 44-501.

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an

issue is more probably true than not true on the basis of the whole record.” K.S.A. 44-508(g).

The claimant's burden must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The medical testimony in the record supports claimant's contention that she has suffered significant injury while employed with Boeing Military Airplanes.

“There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.” K.S.A. 1990 Supp. 44-510e(a).

Claimant was returned to Boeing for a period of time in the work pool, but was ultimately laid off. While this return to work was at a comparable wage, it is clear that subsequent to the layoff, claimant is incapable of obtaining work for wages comparable to the average gross weekly wage she was earning with the respondent at the time of the injury. The Appeals Board finds that the presumption contained in K.S.A. 1990 Supp. 44-510e has been overcome and that claimant is entitled to work disability in this matter.

Claimant was examined by Mr. Jerry Hardin and Ms. Karen Crist Terrill, both vocational rehabilitation experts, regarding the extent to which claimant's ability to perform work in the open labor market and to earn comparable wages has been reduced. The Special Administrative Law Judge found claimant had suffered a fifty-four percent (54%) permanent partial general body work disability taking into consideration the opinions of and the restrictions placed upon her by Doctors Schlachter and Melhorn. The Appeals Board finds the evidence in the record justifies an award to claimant of a fifty-four percent (54%) permanent partial general body work disability.

The Appeals Board, on a review of an award of an Administrative Law Judge, has the authority to increase or diminish an award of compensation. See K.S.A. 44-551(b)(1) as amended by S.B. 59. In finding the evidence in the record supports the Award of the Special Administrative Law Judge the Appeals Board utilized the formula set out by the Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). In Hughes, the Supreme Court gave equal weight to each of the factors regarding claimant's ability to perform work in the open labor market and to earn comparable wages. While it is not required in Hughes that equal weight be given, there is no legitimate reason contained in this record to place greater weight upon one factor over the other, and as such, each is considered equally in determining claimant's work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated April 27, 1994, is affirmed and claimant is entitled to an Award against the respondent, The Boeing Company and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund for an accidental injury occurring on November 27, 1990, based upon an average weekly wage of \$849.16, for 86.57 weeks temporary total disability compensation at the rate of \$278.00 per week, in the sum of \$24,066.46, followed, thereafter, by 328.43 weeks of permanent partial disability compensation at the rate of

\$278.00 per week, in the sum of \$91,303.54 for a 54% permanent partial general body work disability, making a total Award not to exceed \$100,000.00.

As of March 13, 1995, there is due and owing to claimant 86.57 weeks temporary total disability compensation, at the rate of \$278.00 per week, in the sum of \$24,066.46, followed, thereafter, by 137.43 weeks permanent partial general body disability at the rate of \$278.00 per week, in the sum of \$38,205.54, for a total of \$62,272.00, due and owing in one lump sum minus any amounts previously paid.

The remaining 135.71 weeks permanent partial general body disability shall be paid at the rate of \$278.00 per week, in the amount of \$37,728.00, making a total award not to exceed \$100,000.00.

The remaining findings of the Administrative Law Judge, which are not in contradiction to this Award, are affirmed and adopted by the Appeals Board as its own.

Claimant's attorney fee contract is approved, insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed 75% to the respondent and its insurance carrier and 25% to the Kansas Workers Compensation Fund, to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates	
Transcript of Regular Hearing	\$ 88.25
Deposition of Ernest R. Schlachter, M.D. (3-31-93)	\$166.80
Deposition of Jerry D. Hardin	\$267.20
Court Reporting Service	
Deposition of Sandra J. Sills	\$350.70
Deposition Services	
Deposition of Ernest R. Schlachter, M.D. (7-7-93)	\$175.00
Deposition of Karen Crist Terrill	\$184.60
Deposition of J. Mark Melhorn, M.D.	\$209.20

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Stephen J. Jones, Wichita, KS
 Vaughn Burkholder, Wichita, KS
 Michael T. Harris, Wichita, KS
 William F. Morrissey, Special Administrative Law Judge
 George Gomez, Director